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No. 89-1279
IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

Supreme Court, U.S.

FILED

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PACIFIC MUTUAL LIFE INSURANCE
COMPANY,

Petitioner,

-against-

CLEOPATRA HASLIP, CYNTHIA CRAIG,
ALMA M. CALHOUN, and EDDIE HARGROVE,

Respondents.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF ALABAMA

BRIEF FOR AMICUS CURIAE,
THE CITY OF NEW YORK

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF AMICUS CURIAE	1
SUMMARY OF ARGUMENT	8
ARGUMENT	
THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT REQUIRES THAT JURIES BE GIVEN WORKABLE STANDARDS TO GUIDE THEIR DISCRETION IN AWARDING PUNITIVE DAMAGES IN CIVIL CASES. DUE PROCESS FURTHER REQUIRES THAT SUCH AWARDS BE PROPORTIONATE TO THE CONDUCT BEING PUNISHED. ..	9
CONCLUSION	17

TABLE OF AUTHORITIES

	Page
<u>Cases:</u>	
<u>Aetna Life Insurance Co.</u> <u>v. Lavoie</u> , 475 U.S. 813 (1986)	2-3
<u>Bankers Life and Casualty</u> <u>Co. v. Crenshaw</u> , 486 U.S. 71 (1988)	3, 10
<u>Browning-Ferris Industries</u> <u>of Vermont v. Kelco Disposal</u> , ___ U.S. ___, 109 S. Ct. 2909 (1989)	3, 10-11
<u>City of Newport v. Fact</u> <u>Concerns</u> , 453 U.S. 247 (1981)	4
<u>Gertz v. Robert Welch,</u> <u>Inc.</u> , 418 U.S. 323 (1974) ...	15
<u>Ismail v. Cohen</u> , 899 F.2d 183 (2d Cir. 1990)	7
<u>Lassiter v. Department</u> <u>of Social Services</u> , 452 U.S. 18 (1981)	12
<u>Lugar v. Edmondson Oil</u> <u>Co.</u> , 457 U.S. 922 (1982) ...	11
<u>Nardelli v. Stamberg</u> , 44 N.Y.2d 500, 406 N.Y.S. 2d 443 (1978)	15-16
<u>North Georgia Finishing</u> <u>v. Di-Chem, Inc.</u> , 419 U.S. 601 (1975)	11

<u>Pacific Mutual Life Insurance</u> <u>Co. v. Haslip</u> , 553 So.2d 537 (Ala. 1989), cert. granted, ___ U.S. ___, 110 S. Ct. 1780 (1990)	2
<u>Papa v. City of New York</u> , Index No. 15695-86 (N.Y. Supreme Court, Kings Co., 1990)	7-8
<u>Sharapata v. Town of Islip</u> , 56 N.Y.2d 332, 452 N.Y.S.2d 347 (1982)	4
<u>Sniadach v. Family</u> <u>Finance Corp.</u> , 395 U.S. 337 (1969)	11
<u>Solem v. Helm</u> , 463 U.S. 277 (1983)	13-14
<u>Southwestern Telegraph</u> <u>& Telephone Co. v. Danaher</u> , 238 U.S. 482 (1915)	16
<u>Tulsa Professional Collection</u> <u>Services v. Pope</u> , 485 U.S. 478 (1988)	11
<u>Other Authorities:</u>	
New York Court of Claims Act §8	3-4
New York General Municipal Law §50-k	5-6
New York Pattern Jury Instruction 3:50	14-15
U.S. Const. Amend. VIII	13

U.S. Const. Amend. XIV passim

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INTEREST OF AMICUS CURIAE

The City of New York submits this brief in support of reversal of the order of the Supreme Court of Alabama, dated September 15, 1989. In that order, the Supreme Court affirmed judgments, upon jury verdict, of the Alabama Circuit Court,

Jefferson County, which awarded \$1,040,000 to plaintiff Cleopatra Haslip, \$12,400 to plaintiff Cynthia Craig, \$15,290 to plaintiff Alma Calhoun, and \$10,288 to plaintiff Eddie Hargrove. Of the award to Ms. Haslip, punitive damages apparently account for an amount in excess of \$800,000. The Supreme Court of Alabama rejected a challenge to the award of punitive damages based upon the Due Process Clause of the Fourteenth Amendment of the United States Constitution. Pacific Mutual Life Insurance Co. v. Haslip, 553 So.2d 537 (Ala. 1989), cert. granted, ___ U.S. ___, 110 S. Ct. 1780 (1990).

This is the fourth case in recent years to bring before this Court the issue of whether the standardless discretion given to juries to fix the amount of an award of punitive damages violates the Due Process Clause of the Fourteenth Amendment. In Aetna Life Insurance Co. v. Lavoie, 475

U.S. 813 (1986), Bankers Life and Casualty Co. v. Crenshaw, 486 U.S. 71 (1988), and Browning-Ferris Industries of Vermont v. Kelco Disposal, ___ U.S. ___, 109 S. Ct. 2909 (1989), this Court resolved the case without having to address this recurring constitutional issue. In those cases, various amici curiae informed the Court about the growth in recent years of the frequency and size of awards of punitive damages. Those amici were almost exclusively insurance companies and business concerns in the private sector.

The City of New York has felt the effects of increased punitive damage awards and of a growing burden of tort liability in general in recent years. In 1929, the New York State Legislature waived sovereign immunity for torts by the State and its political subdivisions. That waiver is now codified in section eight of the New York

Court of Claims Act. The City is not insured for torts and pays judgments from a budget allocation for that purpose. In fiscal 1988-89, the City paid approximately \$150 million in tort judgments. In fiscal 1989-90, the City will most likely pay in excess of \$170 million in tort judgments. Such payments strain the City's budget in a time of financial stringency.

Some of these payments from the City treasury are for punitive damages. The City suffers from such awards despite being immune from the direct assessment of punitive damages under both New York law and the federal civil rights statutes. Sharapata v. Town of Islip, 56 N.Y.2d 332, 452 N.Y.S.2d 347 (1982); City of Newport v. Fact Concerns, 453 U.S. 247 (1981).

This immunity does not shield the City from the weight of punitive damages. The City has frequently indemnified City

employees who have been assessed punitive damages in civil cases. This indemnification arises from section 50-k of the New York General Municipal Law. General Municipal Law §50-k(2) requires the Corporation Counsel, upon the commencement of an action against a City employee, to make an initial determination whether the act or omission at issue "occurred while the employee was acting within the scope of his public employment and in the discharge of his duties and was not in violation of any rule or regulation of his agency at the time the alleged act or omission occurred." Once the Corporation Counsel makes that determination in the employee's favor, the City provides for the defense of the employee in that civil action.

General Municipal Law §50-k(3) provides that the City indemnify its employees for any judgment arising from an action or omission

which "occurred while the employee was acting within the scope of his public employment and in the discharge of his duties and was not in violation of any rule or regulation of his agency at the time the alleged damages were sustained." The statute further provides that the duty to indemnify does not arise "where the injury or damage resulted from intentional wrongdoing or recklessness on the part of the employee."

The City has paid awards of punitive damages in cases where the Corporation Counsel believes that the employee acted properly within the scope of his or her employment. Once that determination is made, the City does not abandon the employee because the jury reaches a contrary conclusion, perhaps influenced by the vision of a deep pocket. The City indemnifies its well-intentioned employees

regardless of the jury verdict. Thus does the City feel the sting of escalating punitive damages.

This sting is not merely theoretical. In Ismail v. Cohen, 899 F.2d 183 (2d Cir. 1990), the Court of Appeals reinstated a jury verdict of \$800,000, including \$150,000 in punitive damages, against a police officer who the Corporation Counsel determined had acted within the scope of his duties. In Papa v. City of New York, Index No. 15695-86 (N.Y. Supreme Court, Kings Co., 1990) a jury returned a verdict against the City and five police officers in favor of two plaintiffs in a police brutality case for \$76,115,000, including \$46,000,000 in punitive damages against police officers who the Corporation Counsel determined had acted within the scope of their duties. The nisi prius court subsequently reduced the

awards and entered judgment for \$6,005,000, including \$2,500,000 in punitive damages.

Even apart from indemnification, the specter of punitive damages affects the City by affecting the attitude of its employees. The high profile of the City's perceived deep pocket may encourage punitive awards where not even compensatory damages are appropriate. The best judgment of conscientious City employees may understandably be chilled by the prospect of punitive damages. The skyrocketing levels of these awards make this delicate situation that much more chilling.

SUMMARY OF ARGUMENT

The Due Process Clause of the Fourteenth Amendment imposes procedural norms with which each state must comply in framing its system for punitive damages in civil cases. One such norm is that a jury must be given workable standards to guide

its discretion in determining the amount of an award of punitive damages. Due process requires that the amount of punitive damages be proportionate to the conduct being punished.

ARGUMENT

THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT REQUIRES THAT JURIES BE GIVEN WORKABLE STANDARDS TO GUIDE THEIR DISCRETION IN AWARDING PUNITIVE DAMAGES IN CIVIL CASES. DUE PROCESS FURTHER REQUIRES THAT SUCH AWARDS BE PROPORTIONATE TO THE CONDUCT BEING PUNISHED.

The City will not make a full argument in this brief about the requirements of due process upon state laws regarding punitive damages. A complete exposition of the argument must be left to the briefs of the parties to this appeal. This brief presents only the broad contours of one aspect of that argument.

Several recent opinions of individual Justices have noted the apparent merit of

the argument that due process requires some principled limits on a jury's discretion as to the awarding of punitive damages. In Bankers Life and Casualty Co. v. Crenshaw, supra, 486 U.S. at 86-89, Justice O'Connor addressed the due process argument which the Court did not reach. Noting that juries in Mississippi had untrammelled discretion in setting the amount of punitive damages, Justice O'Connor stated that "[t]his grant of wholly standardless discretion to determine the severity of punishment appears inconsistent with due process." Id. at 1656.

In Browning-Ferris Industries of Vermont v. Kelco Disposal, supra, 109 S. Ct. at 2923-2924, Justice Brennan wrote a short concurrence in which he stated that "I join the Court's opinion on the understanding that it leaves the door open for a holding that the Due Process Clause constrains the imposition of punitive damages

in civil cases brought by private parties." Justice Brennan brought attention to "a deeper flaw: the fact that punitive damages are imposed by juries guided by little more than an admonition to do what they think is best." Id. at 2923. The issue of standards for juries as to punitive damages is now before this Court for resolution.

State procedures which authorize juries to award punitive damages are state action for purposes of the Due Process Clause of the Fourteenth Amendment. This Court has applied the requirements of due process to state statutes which govern litigation and property executions between private parties. See, e.g., Tulsa Professional Collection Services v. Pope, 485 U.S. 478 (1988); Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982); North Georgia Finishing v. Di-Chem, Inc., 419 U.S. 601 (1975); Sniadach v. Family Finance Corp., 395 U.S. 337 (1969).

In awarding punitive damages, a jury serves the purposes of punishment and deterrence, classic functions of criminal law. Those functions are served only under the aegis of the state. In empowering a jury to punish civil litigants with punitive damages, a state engages in state action which must comply with the requirements of due process.

The essence of due process in civil litigation is fundamental fairness. Lassiter v. Department of Social Services, 452 U.S. 18, 24-25 (1981). That concern is heightened when juries engage in the classic criminal function of punishment without the safeguards mandated in criminal cases. Fundamental fairness is lacking when juries are told that they may award punitive damages in an amount that they see fit for purposes of punishment and deterrence. Without workable standards and limits, juries are free to assess huge awards of punitive

damages against litigants viewed as deep pockets. Fundamental fairness should forbid singling out unpopular or prosperous defendants as especial targets.

Due process requires that juries be given standards to guide their discretion. A maximum ratio of punitive damages to compensatory damages is an indispensable standard. Such a ratio is common in areas such as anti-trust law. Without such a standard, jury awards of punitive damages are almost inevitably arbitrary. Indeed, juries typically lack workable standards for deciding whether punitive damages should be assessed at all.

More generally, due process forbids punitive awards which are disproportionate to the conduct being punished. The concept of proportionality is inherent in the Eighth Amendment prohibition against excessive fines. See Solem v. Helm, 463 U.S. 277

(1983). The same requirement of proportionality should apply as a matter of due process to civil punishment administered by juries in the form of punitive damages. A maximum ratio of punitive damages to compensatory damages is the most logical measure of proportionality.

Jury instructions typically do not communicate any requirement of proportionality. New York Pattern Jury Instruction 3:50, concerning the tort of malicious prosecution, is representative of the guidance given to juries in cases involving a wide spectrum of torts. As to punitive damages, that instruction states:

There is no exact rule by which to determine the amount of punitive damages. The amount you fix as punitive damages need bear no particular ratio or relationship to the amount you award as compensatory damages. You may fix such amount as you find, in your sound judgment and discretion, based on all of the facts before you, will serve to punish the defendant and deter

others from the commission of like offense.

Such an instruction licenses juries to award huge sums of money in punitive damages when a defendant appears to be a deep pocket. Fundamental fairness requires a principled limit to jury discretion.

Most current judicial review of punitive damage awards is toothless. In Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974), this Court remarked that "[i]n most jurisdictions jury discretion over the amounts awarded is limited only by the gentle rule that they not be excessive." This Court relied in part on the gentleness of such review to ban, under the First Amendment, punitive damages in defamation actions against publishers and broadcasters. Id. The New York Court of Appeals has stated that "the amount of exemplary damages awarded by a jury should not be reduced by a court unless it is so grossly excessive 'as

to show by its very exorbitancy that it was actuated by passion' [cites omitted]." Nardelli v. Stamberg, 44 N.Y.2d 500, 504, 406 N.Y.S. 2d 443, 445 (1978). Due process requires that standards be available to structure a jury verdict from its inception, not that litigants rely on weak court review of an arbitrary verdict.

This Court has overturned a civil penalty which it found to be "so plainly arbitrary and oppressive as to be nothing short of a taking of its property without due process of law." Southwestern Telegraph & Telephone Co. v. Danaher, 238 U.S. 482 (1915). That phrase describes the present system for awarding punitive damages in this country. Due process requires standards and proportionality as indispensable elements of fundamental fairness in this realm.

CONCLUSION

THE DUE PROCESS CLAUSE OF
THE FOURTEENTH AMENDMENT
REQUIRES THAT JURIES BE
GIVEN WORKABLE STANDARDS
AND LIMITS IN AWARDING
PUNITIVE DAMAGES IN CIVIL
CASES. DUE PROCESS FURTHER
REQUIRES THAT SUCH AWARDS
BE PROPORTIONATE TO THE
CONDUCT BEING PUNISHED. THE
ORDER OF THE SUPREME COURT
OF ALABAMA SHOULD BE
REVERSED.

Respectfully submitted,

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